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SUPREME COURT OF THE UNITED STATES

October Term, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, DOING BUSINESS AS HARRY B. HOGAN PAINTING COMPANY, AND ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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PARAGON PRINTING CO., LITTLE ROCK

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OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the Western District of Arkansas in the consolidated *Carroll* (the case under review), *Jennings* and *Sisney* cases (See R. 40 for full style of these cases), filed November 13, 1953, is reported in 116 F. Supp. 491 and appears on pages 40-69 of the printed record in this Court.

The opinion of the United States Court of Appeals for the Eighth Circuit in the consolidated cases of *Lanza* v. *Carroll, et al*, *Lanza* v. *Jennings, et al* and *Lanza* v. *St. Paul-Mercury Indemnity Company, et al* (Nos. 15,016, 15,017 and 15,018, respectively, in that Court), filed July

30, 1954, is reported in 216 F. 2d 808 and appears on pages 135-147 of the printed record in this Court.

The opinion and judgment of the Court of Appeals in the *Carroll* case were adverse to the contention of petitioners. On August 24, 1954, rehearing was denied by that Court. *Lanza* v. *Carroll, et al*, 216 F. 2d 808 (R.151). On November 8, 1954, this Court granted the writ of certorari. *Carroll, et al* v. *Lanza*, 348 U. S. 870, 75 S. Ct. 113, 99 L. Ed. (Adv.) 49 (R.152).

The opinion and judgments of the Court of Appeals in the *Jennings* and *Sisney* cases were in conformity with the contentions of the plaintiffs and intervenors. On December 15, 1954, rehearing in those cases was denied by that Court. *Lanza* v. *Jennings, et al* and *Lanza* v. *St. Paul-Mercury Indemnity Company, et al*, 216 F. 2d 808. The judgments in those cases have since been paid.

Only the *Carroll* case is before this Court. The relevance of the *Jennings* and *Sisney* cases to that case appears in the statement of the case (*infra*, p. 3).

JURISDICTION

Jurisdiction of this Court on writ of certiorari was invoked by petitioners pursuant to USCA, Title 28, Section 1254, as amplified by that part of Rule 19(b) of this Court which provides that this Court will, in considering the question whether it should grant a review on writ of certiorari, consider cases in which

> "a court of appeals has rendered a decision in conflict with a decision of another court of appeals on the same matter;
>
> "or has decided an important state or territorial question in a way in conflict with applicable state or territorial law."

The date of the judgment sought to be reviewed, which was also the time of its entry, was July 30, 1954 (R.148).

The date of the order denying the petition for rehearing was August 24, 1954 (R.151).

The date of the order staying the issuance of the mandate was September 2, 1954 (R.151).

The date of the order of this Court granting the writ of certiorari was November 8, 1954.

QUESTION PRESENTED FOR REVIEW

Petitioner, Carroll, accepted workmen's compensation benefits under the Missouri Workmen's Compensation Act at a time when he was unaware of his right to claim compensation benefits under the Arkansas Workmen's Compensation Act. On the day he learned of his right to claim compensation benefits under the Arkansas act, he renounced his right to claim compensation benefits under the Missouri act, and claimed, and has since been receiving, compensation benefits under the Arkansas act.

The question presented for review is whether Carroll "'elected' to claim compensation benefits under the Missouri act."

A more complete statement of the question presented for review appears at the end of the statement of the case (*infra*, p. 11).

STATEMENT OF THE CASE

On January 26, 1953, petitioner, Virgil G. Carroll, an employee of petitioner, Harry B. Hogan, doing business as Harry B. Hogan Painting Company, was seriously injured as the result of what has since been judicially de-

termined to be the negligence of the respondent, M. Lanza, doing business as Lake Charles Electric Company (R.68, 70; 141-142). Paul A. Jennings and Lonnie Sisney, who were also employees of petitioner, Hogan, were injured at the same time (R. 5, 8; 12-13). The accidents occurred in Baxter County, Arkansas, where respondent, Lanza, was constructing the Bull Shoals Dam and petitioner, Hogan, was engaged in the performance of a subcontract under Lanza (R. 5, 8; 12-13).

The injuries to Carroll, Sisney and Jennings arose out of, and in the course of, their employment by Hogan, who, pursuant to the requirement of the Arkansas Workmen's Compensation Act (Sec. 81-1306, 1951 Cum. P. Supp., Ark. Stats. 1947), carried with St. Paul-Mercury Indemnity Company, the other petitioner, a standard workmen's compensation and workmen's liability policy of insurance on his employees in Missouri and Arkansas (R.93).

On March 2, 1953, Carroll and Jennings filed separate suits for damages against the respondent, Lanza, in the Circuit Court of Baxter County, Arkansas (R. 5-7; 8-10). These suits were duly removed by non-resident defendant to the United States District Court for the Harrison Division of the Western District of Arkansas (R.1-5). Hogan and the St. Paul, who had made payments to Carroll and Jennings on account of their compensation coverage on them, intervened as plaintiffs in these suits for the purpose of asserting their subrogation claims against the recovery, if any, in the third-party suits for damages against Lanza (R.20-26). On June 13, 1953, the St. Paul, Hogan and Sisney filed a suit for damages against Lanza in the United States District Court for the Harrison Division of the Western District of Arkansas, in which suit, as in the *Carroll* and *Jennings* cases, St. Paul and Hogan

asserted subrogation claims against the recovery, if any, against Lanza (R.12-14).

Respondent's answer in each of the three cases denied liability (R.15-20). By agreement, the suits were consolidated for trial by the District Court without a jury (R.27), in which Court they were tried on November 5 and 6, 1953. When, on November 13, 1953, that Court rendered an exhaustive opinion and made appropriate findings of fact and conclusions of law (R.40-69), it entered judgments for the plaintiffs and intervenors against Lanza, as follows: In the *Carroll* case, $18,000.00 (R.70-71); in the *Jennings* case, $6,000.00 (R.71-72); and, in the *Sisney* case, $22,500.00 (R.72-73). Lanza appealed from each of the judgments, but did not question their amounts (R.73-76, 83-86).

On July 30, 1954, the United States Court of Appeals for the Eighth Circuit affirmed the judgments in the *Jennings* and *Sisney* cases (Nos. 15,017 and 15,018 in that Court), concluding that the District Court's "findings that the negligence of Lanza's employees was the cause of the accident resulting in the injuries complained of and that the injured men, Carroll, Jennings and Sisney, were not guilty of contributory negligence as a matter of law" were "supported by substantial evidence", etc., 216 F. 2d 813 (R. 141); but it reversed the judgment in the Carroll case (No. 15,016 in that Court) on the ground that he had " 'elected' to come within the coverage of Missouri (workmen's compensation) law and to recover his compensation under that law." 216 F. 2d 815 (R.146).

At this juncture, petitioners set out the reasons which impelled the Court of Appeals—erroneously, as petitioners maintain—to invoke the doctrine of election of remedies and reverse the judgment in the case under review (the *Carroll* case) while properly affirming the judgments in

the *Jennings* and *Sisney* cases. Petitioners submit that the reasons assigned by the Court of Appeals are wholly insufficient to bring about a result in the *Carroll* case different from that in the *Jennings* and *Sisney* cases.

In the first place, the Court of Appeals rested its opinion upon the failure of Carroll to file the written notice permitted under Section 3300, Mo. Stat. Ann., 1929, which provides as follows (216 F. 2d 815 (R.145)):

> "Every employer and every employee, except as in this chapter otherwise provided, shall be conclusively presumed to have elected to accept the provisions of this chapter and respectively to furnish and accept the compensation as herein provided, unless prior to the accident he shall have filed with the commission a written notice that he elects to reject this chapter."

The Court of Appeals took the view that, by failing to file the written notice permitted under that statute, Carroll thereby "elected" to have his right to maintain this suit determined by the Missouri act. 216 F. 2d 815-816 (R.145-146). Petitioners maintain that, by failing to file the written notice permitted by Section 3300, Carroll merely elected to be considered as being a "compensation" employee, not a "common law" employee, and that he was free to elect to claim compensation benefits under the law of *any* State under which those benefits could properly be paid to him.

In the second place, the Court of Appeals based its decision upon the fact that Carroll accepted payments of $30 a week under the Missouri act for approximately nine months. The Court, reasoning that he thereby elected "to recover his compensation under" the Missouri law, held that he could not thereafter " 'change his mind' and elect to come under the Arkansas law, accept $25 a week there-

after, and maintain this third-party action under the Arkansas law". 216 F. 2d 815 (R.146). In other words, the Court invoked the doctrine of election of remedies against Carroll and held that, although his injury occurred in Arkansas, the Missouri act applied to the exclusion of the Arkansas act.

Petitioners contend that Carroll never elected to come under the Missouri law. This makes it necessary, therefore, to state the facts material to the question whether there was an election. All of these facts are uncontradicted.

Jennings and Sisney were residents of Arkansas, where their contracts of employment were made (R.105, 108). They always claimed, and were paid, workmen's compensation benefits under the Arkansas Workmen's Compensation Act (R.23, 14). All the parties in the *Jennings* and *Sisney* cases agreed that the question whether the plaintiffs and intervenors therein could maintain those suits should be determined under the Arkansas act. The United States Court of Appeals for the Eighth Circuit had held, in 1945, that such suits could be maintained: that is to say, that a general contractor (as, for example, Lanza) is, as to employees of subcontractors carrying workmen's compensation insurance (as, for example, Hogan), a "third-party" who, under Arkansas compensation law, may be sued for common law negligence. *Anderson* v. *Sanderson & Porter*, 146 F. 2d 58, 60. That Court re-affirmed that doctrine in the *Jennings* and *Sisney* cases, 216 F. 2d 808, 816 (R.135, 147).

But the Supreme Court of Arkansas had never passed upon that question on July 30, 1954, when those cases were decided. Accordingly, the Court of Appeals deferred action upon Lanza's petition for rehearing in the *Jennings*

and *Sisney* cases until *The Baldwin Company* v. *Ernest Maner, Judge* (Ark.), 273 S.W. 2d 28, was decided. The question there was precisely the same as the question in the *Anderson* case. The opinion in *The Baldwin Company* case was rendered December 6, 1954. The Supreme Court of Arkansas there followed the doctrine of the *Anderson* case. Accordingly, on December 15, 1954, the Court of Appeals denied Lanza's petition for rehearing in the *Jennings* and *Sisney* cases. 216 F. 2d 808.

Carroll was a resident of Missouri, and his contract of employment with Hogan was made in that State (R. 92, 94). Carroll never procured an award from the Missouri Workmen's Compensation Commission and never even filed his claim with that commission (R.98, 94, 35-37); but the St. Paul, for a period of 34 weeks (January 26, 1953-October 10, 1953), voluntarily paid workmen's compensation benefits to him under the Missouri act (R.35-37), and he knew these benefits were being paid to him under that act (R.30).

On October 10, 1953, *Carroll learned for the first time that he could have claimed workmen's compensation benefits under the Arkansas Workmen's Compensation Act* (R.35,37). On that day he wrote letters to the Kansas City, Missouri, and Little Rock, Arkansas, offices of the St. Paul, requesting that his "compensation benefits be computed under the Workmen's Compensation Act of Arkansas instead of the Workmen's Compensation Act of Missouri" and that his "claim be considered a claim under the Arkansas act" (R.35,32-33). Carroll said in an affidavit (R.35):

> "If I had known all along that I had the right to receive compensation benefits under the Workmen's Compensation Act of Arkansas, I would, immediately after I was injured, have requested

that these benefits be paid to me under the law of Arkansas instead of under the law of Missouri."

The affidavit of Harold J. Fisher, Carroll's Springfield, Missouri, lawyer, dated October 20, 1953, was likewise to the effect that it was not until October 10, 1953, that he advised Carroll of his right to obtain compensation benefits under the Arkansas act if he so desired. Mr. Fisher also made it plain that Carroll's compensation claim was never filed with the Missouri commission (R.36-37). These affidavits, which were filed by petitioners in opposition to respondent's motion for summary judgment under Rule 56 (R.29-30), were never drawn in question by respondent.

By letter dated October 21, 1953, the Little Rock office of the Saint Paul, in filing the claim with the Arkansas Workmen's Compensation Commission, said, among other things: "We have no objection to Mr. Carroll's election to receive his benefits under the Arkansas act" (R.31). The Arkansas Workmen's Compensation Commission promptly accepted the claim and assigned to it a number, as shown by the certificate of the chairman of that commission, dated October 22, 1953 (R.38); and Carroll has been receiving his compensation benefits under the Arkansas act since that time.

On these facts, the District Court denied Lanza's motion for summary judgment (R.59). That Court reasoned that, since the accident occurred in Arkansas, Carroll could, from the beginning, have claimed compensation benefits under the law of Arkansas, in which event, under the doctrine of the *Anderson* case, he could have successfully maintained this suit, and that he was not thereafter estopped or precluded from renouncing his rights under the Missouri act and claiming benefits under the Arkansas act for the reason that, during all the time that he was

receiving benefits under the Missouri act, *he was unaware of his rights under the Arkansas act* (R.54-59).

The Court of Appeals, overlooking the uncontradicted testimony that Carroll was *not aware* of his rights under the Arkansas act while he was receiving compensation benefits under the Missouri act, held that Carroll's acceptance of benefits under the Missouri act constituted an election "to come within the coverage of the Missouri law and to recover his compensation under that law" and that he could not thereafter " 'change his mind' and elect to come under the Arkansas law, accept $25 a week thereafter and maintain this third-party action under the Arkansas law". 216 F. 2d 815 (R.146).

As was pointed out by the Court of Appeals in the *Anderson* case, the provisions of the Missouri Workmen's Compensation Act differ in controlling respects from the corresponding provisions in the Arkansas Workmen's Compensation Act upon the question whether an employee of a subcontractor who carries workmen's compensation insurance on his employees may maintain a common law action for damages against the prime contractor. 146 F. 2d 60. In *Banner* v. *Patti*, 343 Mo. 274, 121 S. W. 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950, which were cited in the *Anderson* case, the Supreme Court of Missouri and the United States Court of Appeals for the Eighth Circuit, respectively, had held that, under the Missouri act, such a suit could not be maintained. Accordingly, since the Court of Appeals had held—erroneously, as petitioners contend in this (the *Carroll*) case—that Carroll had elected "to come within the coverage of the Missouri law and to recover his compensation under that law", in consequence of which the rights of the parties should be determined under the Missouri act instead of the Arkansas

act, it reversed the judgment against Lanza in the *Carroll* case.

The question presented for review (*supra*, p. 3), therefore, is upon the validity of the opinion of the Court of Appeals that, by not filing a written notice rejecting the provisions of the Missouri Workmen's Compensation Act and by accepting workmen's compensation benefits under that act at a time when he did *not* know that he could have claimed and received compensation benefits under the Arkansas Workmen's Compensation Act, Carroll "'elected' to come within the coverage of the Missouri law" (216 F. 2d 815 (R. 146)) and was thereby precluded from renouncing his rights under the Missouri act and from claiming benefits under the Arkansas act on the day he first learned of his rights under the Arkansas act.

ARGUMENT

The sole question is whether Carroll "elected" to claim compensation benefits under the Missouri Workmen's Compensation Act. Petitioners contend not only that he never made an election until October 10, 1953, but that he necessarily could not have made an election before that time for the reason that, prior to that day, he believed that he had the right to claim benefits *only* under the Missouri act (R.35, 37). It has been pointed out that, on October 10, 1953, Carroll elected to claim benefits under the Arkansas act (*supra*, p. 8); R.35, 32-33).

Petitioners maintain that Carroll was within his rights in claiming and receiving benefits under the Arkansas act; that the question whether he is entitled to maintain this common law action for damages against the prime contractor must, therefore, be determined under the Arkansas act; and that since, under the Arkansas act, such a suit may be maintained, the Court of Appeals erred in reversing the judgment of the District Court in favor of petitioners.

We now consider the two reasons advanced by the Court of Appeals in support of its conclusion that Carroll " 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law". 216 F. 2d 815 (R.146).

(a) *Carroll's Failure to File a Written Notice Rejecting the Missouri Act Did Not Constitute an "Election"*

The Missouri statute upon which respondent relies (Section 3300, Mo. Stat. Ann., 1929; *supra*, p. 6) relates, and relates only, to the question whether an employee de-

sires to be a "compensation" employee or a "common law" employee. The statute has no bearing, directly or indirectly, upon the question whether a "compensation" employee in a given case desires to receive his workmen's compensation benefits under the law of Missouri or under the law of any other State (for example, Arkansas) under whose workmen's compensation act he might be entitled to receive benefits.

In other words, the failure of Carroll to file with the Missouri commission the written notice referred to in the statute means at most that he is a *compensation* employee, not a common law employee; it does *not* mean that he thereby "elected" to receive compensation payments *under the Missouri Act*. Whether or not he has made such an election depends upon the application of the doctrine of election of remedies to the facts in this case, wholly influenced by, and separate and apart from, the circumstance that, by his failure to file the written notice, he became a compensation employee under the law of *some* State.

The Court of Appeals, noting that "Carroll did not file a notice with the commission in Missouri electing to reject the Missouri law", said that "the Missouri act applies to injuries received outside the State under a contract of employment made in the State. Section 3300, Mo. St. Ann.; *Hungate* v. *Hudson*, Mo., 169 S.W. 2d 682" (R.145). If, by this observation, the Court of Appeals intended to hold that, by Carroll's failure to file the written notice permitted under Section 3300, he elected to come under the Missouri act, thereby making it impossible for him to claim compensation benefits under the Arkansas act, the ruling was in conflict with decisions of this Court which hold that a State may provide workmen's compensation benefits for all employees injured within it, even

though they are residents of another State and even though their contract of employment was made in another State.

Pacific Employers Insurance Company v. *Industrial Accident Commission of California*, 306 U. S. 493, 83 L. Ed. 940, 59 S. Ct. 629, is a leading case on the point. There, a Massachusetts employee of a Massachusetts employer was injured in California in the course of his employment. He obtained a compensation award from the Industrial Accident Commission of California. The employer's insurance carrier thereupon filed a petition to set aside the award upon the grounds that the employee "was subject to the workmen's compensation law of Massachusetts, and that the California Commission, in applying the California act, and in refusing to recognize the Massachusetts statute as a defense, had denied to the latter the full faith and credit to which it was entitled under Article 4, Section 1 of the Constitution" (p. 497) of the United States. More specifically, the insurance carrier relied upon "the provisions of the Massachusetts Act that the compensation shall be that prescribed for injuries suffered in the course of employment, whether within or without the State" (p. 499), and it insisted that, "since the contract of employment was entered into in Massachusetts and the employer consented to be bound by the Massachusetts Act, that, and not the California statute, fixes the employee's right to compensation, whether the injuries were received within or without the State, and that the Massachusetts statute is constitutionally entitled to full faith and credit in the courts of California" (p. 499).

The Supreme Court of California rejected the insurance carrier's contention. Affirming that decision, this Court held that the full faith and credit clause does not go so far as to deny the right of a State to apply its

own workmen's compensation statute in its courts in the case of an employee injured within the State. The Court said (p. 503):

> "Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. *Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power*" (Italics supplied).

To the same effect is the recent (December 6, 1954) case of *Watson* v. *Employers Liability Assurance Corporation*, 348 U. S. 66, 75 S. Ct. 166, 99 L. Ed. 90. There, appellants bought and used in Louisiana, and were injured there by, "a hair waving product alleged to have contained a highly dangerous latent ingredient put there by its manufacturer" (p. 67). Louisiana has a statute which allows "injured persons to bring direct actions against liability insurance companies that have issued policies contracting to pay liabilities imposed on persons who inflict injury" (p. 67). Pursuant to that statute, appellants brought, in a Federal Court in Louisiana, a direct action against appellee, which had issued a liability policy on the manufacturer.

The company contended, among other things, that the Louisiana statute was violative of the full faith and credit clause. This Court, in stating the issue, said (p. 67):

> "The particular problem presented with reference to enforcing the Louisiana statute in this

> case arises because the insurance policy sued on was negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois. This Massachusetts-negotiated contract contains a clause, recognized as binding and enforceable under Massachusetts and Illinois law, which prohibits direct actions against the insurance company until *after* final determination of the (manufacturer's) obligation to pay personal injury damages either by judgment or agreement."

This Court upheld the validity of the Louisiana statute, which was in the teeth of the clause in the insurance policy sued on, with reference to the full faith and credit clause, saying (p. 73):

> "That clause does not automatically compel a state to subordinate its own contract laws to the laws of another state in which a contract happens to have been formally executed. Where, as here, a a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies (Citing cases). We have already pointed to the vital interests of Lousiana in liability insurance that covers injuries to people in that State. Of course Massachusetts also has some interest in the policy sued on in this case. The insurance contract was formally executed in that State and (the manufacturer) has an office there. But plainly these interests cannot outweigh the interests of Louisiana in taking care of those injured in Louisiana. Since this is true, the Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules", (Citing cases).

State ex rel. Weaver v. *Missouri Workmen's Compensation Commission*, 339 Mo. 150, 95 S.W. 2d 641, is a Missouri case in accord. There, a resident of Missouri, whose contract of employment was made in Illinois, died from injuries received in Missouri while acting in the

scope of his employment. His widow applied for compensation benefits under the Missouri act. The Missouri commission "declined to take jurisdiction of the application upon the grounds that (1) since the contract of employment was made in Illinois, the Missouri statute (subsection (b), *supra*) does not apply and (2) even if the Missouri statute would apply, the Missouri commission should decline jurisdiction because the Illinois law also applies, and must, under the full faith and credit clause of the Federal Constitution, be given effect in Missouri" (p. 642).

Thereupon the widow applied to the Supreme Court of Missouri for a writ of mandamus to compel the Missouri commission to take jurisdiction of her claim. That Court held that the widow had a right to proceed under the compensation law of Missouri or the compensation law of Illinois and that, consequently, neither of those laws was exclusive of the other, saying (p. 643):

> "The Missouri Law applying, the Illinois Act also applying, and each providing that its remedy is in lieu of all others, the two statutes and the relationship created by each are brought into direct conflict."

The Court then held that the full faith and credit clause of the Constitution of the United States did not prevent Missouri from considering the claim under its own compensation act.

In the Court below, respondent also relied upon Section 3310, Mo. Stat. Ann., 1929, which provides as follows:

> "This chapter shall apply to all injuries received in this state, regardless of where the contract of employment was made, and also to all injuries received outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide."

Respondent argued that, since Carroll's contract of employment was made in Missouri and since that contract contained no provision as to the State whose law would govern the construction of the contract, the statute makes the Missouri act apply to the exclusion of the right of Arkansas to provide compensation benefits for Carroll, even though he was injured in Arkansas. The cases cited above resolve this argument against respondent's contention.

The opinion of the Court of Appeals cited, and relied upon, *Magnolia Petroleum Company* v. *Hunt*, 320 U. S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (216 F. 2d 816 (R.147)). But the case is not in point. There, the plaintiff, who had already "sought and procured in Texas an award of compensation for his injury under its Workmen's Compensation Law" (p. 432), thereafter undertook to obtain compensation for the same injury under the Louisiana Workmen's Compensation Law. This Court properly rejected his claim under the Louisiana law, holding that "the Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the the Louisiana Act" (p. 442).

As pointed out in the statement of the case at bar (*supra*, p. 8), Carroll never procured an award of compensation from the Missouri commission and never even filed his claim with that commission (R.98, 94, 35-37). The *Carroll* case is, therefore, clearly distinguishable from the *Magnolia Petroleum Company* case, since there is no award of the Missouri commission to which full faith and credit can be given.

Respondent also relied upon *Butler* v. *Lee Brothers Trucking Contractors*, 206 Ark. 884, 178 S.W. 2d 58, to support his contention that the full faith and credit clause

precludes Carroll from asserting his claim for compensation benefits under the Arkansas act after October 10, 1953. In that case, Butler's claims for "injuries were presented to the Colorado Compensation Commission and allowances were made as provided by the statutes of that State" (p. 885). The Supreme Court of Arkansas properly held that he could not thereafter obtain benefits on the same cause of action under the Arkansas act. That Court, basing its opinion upon the fact that *Butler had obtained a compensation award from the Colorado Commission*, cited the *Magnolia Petroleum Company* case as authority for its decision. Here, Carroll never sought or procured an award from the Missouri commission.

Respondent contended in the Court of Appeals that it was "customary in Missouri, in uncontested compensation cases, for the act to be implemented by the payment and receipt of compensation, without any requirement that there be any formal claim or formal award". If such a custom exists, it devolved upon respondent to establish it. The record is silent on the point. Even if such a custom had been shown to exist in Missouri, it would have availed respondent nothing, since the full faith and credit clause does not cover customs but is referable only to "the public acts, records and judicial proceedings" of a State. Constitution of the United States, Article 4, Section 1.

These authorities establish these rules:

Notwithstanding the Missouri statutes upon which respondent relies, Arkansas has the right to enact a workmen's compensation act which is available to all employees injured in Arkansas, even though their contracts of employment were made in Missouri; and

Notwithstanding the full faith and credit clause, Carroll was free to assert his right to compensation benefits

EITHER under the Missouri act (because his contract of employment was made in Missouri) OR under the Arkansas act (because he was injured in Arkansas).

It follows that respondent's contention, in the Court of Appeals, that the remedies provided by the Missouri act are exclusive of all other remedies is without merit.

We pass now to a consideration of the question whether, by accepting compensation payments under the Missouri law, Carroll elected to come within the coverage of that law.

(b) *Carroll's Acceptance of Compensation Benefits Under the Missouri Act at a Time When He Was Unaware of His Right to Claim Benefits under the Arkansas Act Did Not Constitute an "Election"*

In the statement of the case (*supra*, p. 8), it was pointed out that the uncontradicted proof was that the Missouri commission never made an award of compensation benefits to Carroll and that he never even filed a claim for compensation benefits with that commission (R.98, 35-37); that it was not until October 10, 1953, that Carroll knew that he could, if he so desired, obtain compensation benefits under the Arkansas act (R. 35, 37); and that, on that very day, in letters to the St. Paul, he renounced his rights under the Missouri act and claimed compensation benefits under the Arkansas act (R.31, 32-33). Under these circumstances, Carroll made no "election" until October 10, 1953, because it was not until that day that there was "a conscious exercise of choice" by him.

The rule in Arkansas is stated as follows in *City National Bank* v. *McCann*, 193 Ark. 967, 980, 106 S.W. 2d 195:

> "Therefore, the case of *Craig* v. *Meriwether*, 84 Ark. 238, 105 S.W. 585, cited by plaintiffs, is con-

trolling. '*The binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other.* In order that a person who is put to his election should be concluded by it, two things are necessary: first, a full knowledge of the nature of the inconsistent rights, and of the necessity of electing between them; second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence'" (Italics supplied).

This also is the rule in Missouri. In *Sutorius* v. *Mayor*, 350 Mo. 1235, 170 S.W. 2d 387, 396, the Supreme Court of Missouri said:

> "The rule is that acts and conduct to constitute an election must be unequivocal in character, showing an intention to elect, and be done with an understanding of the situation and with the intent to make an election. *Calvin* v. *Hutchison, supra. Acts done in ignorance of one's legal rights and without knowledge of the facts necessary to a decision do not amount to a binding election where the position of the parties has not changed*" (Citing Missouri cases) (Italics supplied).

In the case at bar, the position of the parties has not changed.

This Court has likewise consistently limited the application of the doctrine of election of remedies to cases in which the party against whom it is sought to be invoked had knowledge of his rights and of the facts at the time the election is alleged to have been made. *Robb* v. *Vos*, 155 U. S. 13, 43, 39 L. Ed. 52, 15 S. Ct. 4; and *United States* v. *Oregon Lumber Company*, 260 U. S. 290, 295, 67 L. Ed. 261, 43 S. Ct. 100.

Various United States courts of appeals have likewise emphasized the fact that there can be no election of remedies unless, at the time the election is alleged to have been made, the party had full knowledge of the nature of his inconsistent rights. The following cases are typical of many:

Third Circuit: *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 73 F. 2d 387, 389; and *Flannery Bolt Company* v. *Greenslade*, 26 F. Supp., 502, 505; affirmed 108 F. 2d 531; certiorari denied 309 U. S. 671, 84 L. Ed. 1017, 60 S. Ct. 615.

Fifth Circuit: *A. Klipstein & Company* v. *Grant*, 141 F. 72.

Ninth Circuit: *Miles* v. *Lavender*, 10 F. 2d 450, 454.

Tenth Circuit: *Minneapolis National Bank* v. *Liberty National Bank*, 74 F. 2d 434, 436.

Petitioners have found no authority to the contrary.

The undisputed proof brings this case squarely within the rule that Carroll did not elect, and necessarily could not have elected, to accept compensation benefits under the Missouri act for the reason that, while he was receiving them, he did not know that he had the right to claim compensation benefits under the Arkansas act.

Apparently realizing the legal effect of this evidence (*i.e.*, that Carroll did not know of his rights under the Arkansas act until October 10, 1953), respondent, in the Court of Appeals, was driven to the contention that "it must be assumed" that Mr. Fisher and the St. Paul knew of Carroll's rights under the Arkansas act prior to that time and that knowledge should be imputed to Carroll. Respondent offered no proof that these parties had that knowledge; and it would be highly improper to assume that they had it. Even if the Court should make the assumption

requested by respondent, it would avail him nothing for the reason that "the binding force of an election cannot be predicated upon mere imputed knowledge, for the doctrine (of election of rem edies) is based entirely upon the idea of a conscious exercise of choice between two remedies which are inconsistent with each other". *City National Bank* v. *McCann*, 193 Ark. 967, 980, 106 S.W. 2d 195; *supra*, p. 20. It follows, therefore, that, even if Mr. Fisher and the St. Paul were aware of Carroll's rights under the Arkansas act prior to October 10, 1953, that knowledge would not be imputed to Carroll.

In the Courts of Appeals, respondent complained of the "gymnastics engaged in by Carroll on October 10, 1953". Petitioners inquire: "What gymnastics?" It is true that, in order to be able to maintain his common law action for damages against the prime contractor, Carroll took steps that day to claim compensation benefits under the Arkansas act, thereby electing to submit his claim under that act. The third party tortfeasor, whose negligence has been adjudicated to have caused Carroll's injuries, should not be heard to complain that Carroll looked after his own interest promptly after he first learned of his rights under the Arkansas act. Carroll testified that if he had known from the beginning that he had the right to claim compensation benefits under the Arkansas act, he would have claimed them under that act (R.35). Surely he should not be criticised for asserting his rights thereunder as soon as he ascertained that he had such rights.

It is true, as pointed out by the Court of Appeals (216 F. 2d 815 (R.146)), that the District Court erroneously stated that Carroll did not know that he received compensation payments under the Missouri act (R.58, 60). But the error is of no consequence. The controlling and undisputed fact is that Carroll was *wholly unaware* of his

rights under the Arkansas act throughout the entire period of his acceptance of compensation benefits under the Missouri act. The District Court correctly declared and applied the law when it held (R.59):

> "It was not until October 10, 1953, that Carroll exercised a conscious choice between two inconsistent remedies, and it was not until then that he made an election as to which Act he desired to govern his compensation payments. His (fol. 75) decision was to accept such payments under the Arkansas Act, and the Arkansas Workmen's Compensation Commission accepted the filing of his claim.
>
> "The accident occurred in Arkansas, and it would seem that by virtue of Sections 81-1302 and 81-1303, Arkansas Statutes 1947, Annotated (1951 Supp.), Carroll's claim may be granted under the Arkansas Act. And, since he is receiving compensation under the Arkansas Act, he is also entitled to the benefit of its third party rule permitting an employee of a subcontractor to prosecute a suit against the general contractor. Therefore, the Court has jurisdiction of the action brought by Carroll against the defendant herein, and defendant's motion for judgment should be denied."

CONCLUSION

The Court of Appeals, holding that Carroll's failure to file a written notice rejecting the Missouri Workmen's Compensation Act constituted an election to come under that act and that his acceptance of compensation benefits under the Missouri act at a time when he was unaware of his right to claim benefits under the Arkansas act constituted a like election, reversed the judgment of the District Court for petitioners upon the ground that the Missouri act, under which the action could not be maintained, applies. This was error.

The question whether petitioners may maintain this common law action for negligence must, therefore, be determined under the Arkansas Workmen's Compensation Act, in which State Carroll was injured. Under that act, as construed in the *Anderson* case (*supra*, p. 7) and *The Baldwin Company* case (*supra*, p. 8), the action may be maintained.

Accordingly, the judgment of the Court of Appeals should be reversed and the cause remanded to that Court, with directions to reinstate the judgment of the District Court.

Respectfully submitted,

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